**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **ICEALINDA GIVENS,** | : | **CIVIL ACTION** |
| | : | |
| **Plaintiff,** | : | |
| | : | |
| **v.** | : | |
| | : | |
| **CARL OSLICK, RONALD ZAPPAN, and MICHAEL BARONE,** | : | |
| | : | |
| | : | |
| **Defendants.** | : | **NO. 97-6756** |

**M E M O R A N D U M**

**Reed, S.J.** **June 21, 2000**

Now before the Court are the reinstated motions for summary judgment of defendant Carl Oslick (Document No. 21, reinstated by praecipe, Document No. 25) and defendants Ronald Zappan and Michael Barone (Document No. 20, reinstated by praecipe, Document No. 24). For the following reasons, defendants' motions will be granted in part.

**Background**

In 1995, plaintiff Icealinda Givens was a parolee in the custody of the Pennsylvania Board of Probation and Parole. On August 3, 1995, plaintiff and a number of other women were transported aboard a van from the Philadelphia County Prison System to the State Correctional Institution at Muncy. Two parole officers accompanied the parolees; Heriberto Sanchez[1] and Carl Oslick.

According to plaintiff's complaint, during the August 3 transfer, Oslick initiated offensive and unwelcome contact with her. Plaintiff alleges that Oslick touched her legs and

[1] Sanchez was a defendant in this matter at the outset, but has since been dismissed from the case. See Stipulation of Dismissal, Document No. 29 in Harris v. Oslick, Civil Action No. 97-4957, filed Jan. 14, 1999.

groped her crotch while she was shackled, rubbed her breasts, and made sexually explicit comments about her legs and breasts. See Second Amended Complaint, at ¶ 12. Plaintiff also alleges that Oslick's supervisors, defendants Barone and Zappan, were aware that Oslick had engaged in offensive conduct toward female parolees during prior transfers and nevertheless allowed Oslick to continue to accompany female parolees on transfers.

Plaintiff's case is one of eight separate actions that were brought against Oslick, Sanchez, Barone, and Zappan arising out of the conduct of Oslick during the transfer of female parolees. This case is one of two still standing; every other action but one has succumbed to summary judgment. See Harris v. Oslick, No. 97-4957, Order, Document No. 31 and 32, filed May 28, 1999; Hamilton v. Oslick, No. 97-6751, Order, Document No. 21, filed June 26, 1999; McFadden v. Oslick, No. 97-6754, Order, Document No. 28, filed July 6, 1999; Dill v. Oslick, No. 97-6753, Order, Document No. 22, filed July 19, 1999; McNeil v. Oslick, No. 97-6757, Order, Document No. 21, filed August 19, 1999; Walker v. Oslick, No. 97-6755, Order, Document No. 25, filed September 9, 1999; Powell v. Oslick, No. 97-6752, Order, Document No. 21, filed September 15, 1999.[2]

Defendants submitted the instant motions in late 1998, however, in an Order dated June 17, 1999, this Court denied the motions without prejudice to defendants' right to reinstate them with supplemental materials, including a transcript of plaintiff's deposition. The Order also

[2] Published decisions were issued in Harris v. Oslick, No. 97-4957, 1999 U.S. Dist. LEXIS 8404 (E.D. Pa. May 28, 1999) and Dill v. Oslick, No. 97-6753, 1999 U.S. Dist. LEXIS 10746 (E.D. Pa. July 19, 1999). In Dill, the Court granted the motions of Barone and Zappan for summary judgment, but, in a separate, unpublished order, granted Oslick's motion for summary judgment only as to the § 1985 claim, and denied summary judgment as to the remaining claims. See Dill v. Oslick, No. 97-6753, Order, Document No. 23, filed, July 19, 1999. The allegations in that case, however, involve more offensive conduct than took place in this case, and plaintiff apparently produced evidence in Dill, whereas in this case, plaintiff has produced none.

required plaintiff to file supplemental materials. The motions were reinstated by praecipe in July 1999 with supplemental materials.

**Analysis**

In deciding a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, "the test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). Furthermore, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 250. On a motion for summary judgment, the facts should be reviewed in the light most favorable to the non-moving party. See Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 146 (3d Cir. 1993).

In their original motions for summary judgment, defendants point to absences of a genuine issue of material fact on all of plaintiff's claims, and argue that they are entitled to judgment as a matter of law on each count of her complaint. Specifically, defendants argue that there is no evidence that Carl Oslick engaged in anything but offensive banter with plaintiff, and that there is no evidence that Barone and Zappan were aware that Oslick posed a danger to plaintiff.

Recognizing that the record was incomplete with regard to Oslick's conduct toward

plaintiff Givens, the Court provided defendants and plaintiff with an opportunity to supplement the record. This Court explicitly required defendants to produce "the deposition transcript of Givens and any other evidence showing the nature and extent of Givens' alleged injuries and the details and severity of the events she alleged happened on August 3, 1995." Order, June 17, 1999, at 2. Plaintiff was given an opportunity to respond to defendants' evidence with supplemental materials of her own.

According to defendants, plaintiff did not appear at a scheduled deposition, despite receiving notice thereof. Defendants have submitted no additional evidence concerning plaintiff's injuries. Plaintiff, however, bears the burden of coming forward with evidence to defeat the motion for summary judgment, and I conclude that plaintiff has not done so.

The only material plaintiff offers is an unsworn written statement she gave to a special agent in the Office of the Attorney General of Pennsylvania, and a written record from a counseling session unaccompanied by an affidavit. However, the Court of Appeals for the Third Circuit has held that "Rule 56 of the Federal Rules of Civil Procedure states that motions both for and in opposition to summary judgment may be supported by affidavits; unsworn statements, such as those relied upon in the instant matter, fail to meet this requirement." Small v. Lehman, 98 F.3d 762, 765 n.5 (3d Cir. 1996) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17, 90 S. Ct. 1598 (1970)). There is, therefore, virtually no reliable evidence on the record in this case to support the serious allegations made in plaintiff's second amended complaint. Plaintiff instead appears content to rest on the allegations in her complaint, which are insufficient to withstand summary judgment. See Spain v. Gallegos, 26 F.3d 439, 446 (3d Cir. 1994). ("When the movant has produced evidence in support of his motion, the nonmovants cannot rest on their

pleadings, but must come forward with enough evidence to create a material issue of fact."). For that reason alone, summary judgment should be granted.

Even were there an affidavit or deposition transcript in which Givens testified that Oslick actually touched her in the manner alleged in her complaint, Givens' claims would fail as a matter of law. Her Count I claim against all defendants under the civil remedy provided by the Violence Against Women Act, 42 U.S.C. § 13981, was recently foreclosed by the Supreme Court of the United States in United States v. Morrison, U.S. , 120 S. Ct. 1740, 1759 (2000) which declared § 13981 unconstitutional.[3] Plaintiff's Count I § 1983 claim against Oslick fails because the conduct described in her complaint, while reprehensible, was not sufficient to rise to the level of an Eighth Amendment violation. See Harris v. Zappan, No. 97-4957, 1999 U.S. Dist. LEXIS 8404, at *8-10 (E.D. Pa. May 28, 1999) (sexual harassment by prison officials during incarceration violates Eighth Amendment only if "severe or repetitive") (quoting Boddie v. Schnieder, 105 F. 3d 857 (861) (2d Cir. 1997) and citing Berryhill v. Schriro, 137 F.3d 1073, 1076 (8th Cir. 1998);Jones v. Culinary Manager II , 30 F. Supp. 2d 491, 497 (E.D. Pa. 1998)).[4] The supervisory liability of Barone and Zappan under § 1983 (also Count I) cannot be established without evidence that they knew Oslick posed a danger to Givens and were deliberately

[3] The Supreme Court held that § 13981 was not a valid exercise of the power of Congress under the Commerce Clause or the Fourteenth Amendment. The Court's Fourteenth Amendment analysis noted § 13981 violated the Fourteenth Amendment because it was "directed not at any State or state actor, but at individuals," to regulate private, non-state conduct. Here, plaintiff attempts to apply § 13981 to a state actor, which, one could argue, is the only application of § 13981 that would be allowed under Morrison. However, the Supreme Court did not appear to preserve § 13981 for application to state officials, and I conclude that it does not apply in this case. Even if it did, plaintiff has not alleged or brought forward evidence of a "crime of violence" as required under § 13981 (b).

[4] There is no evidence to support plaintiff's §1983 allegation of an equal protection violation and deprivation of liberty under the Fourteenth Amendment; plaintiff points to nothing indicating that Oslick or any other defendant treated plaintiff differently because of her race or sex, and there is insufficient evidence to support a substantive due process claim.

indifferent to that risk, see Dill v. Oslick, No. 97-6753, 1999 U.S. Dist. LEXIS 10746, at *16 (E.D. Pa. July 19, 1999) (citing Baker v. Monroe Twp., 50 F.3d 1186, 1190-91 & n.1 (3d Cir. 1995)); there is no such evidence here.[5]

Plaintiff's Count II § 1985 claim fails because there is no evidence of a conspiracy among the defendants to deprive a class of persons of rights secured by the Constitution. See Stephens v. Kerrigan, 122 F.3d 171, 184 (3d Cir. 1997).[6] Her Count III claim against Barone and Zappan under § 1983 for failure to protect under the Fourteenth Amendment cannot withstand summary judgment either, because, as noted above, there is insufficient evidence from which a reasonable jury could infer that Barone and Zappan knew Oslick was a threat to prisoners and refused to act on that knowledge. See Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970 (1994) (prison official's failure to protect does not violate Eighth Amendment unless she "knows of and disregards an excessive risk to inmate health or safety").[7] Thus, summary judgment will be granted as to all of plaintiff's federal claims.

---

[5] A careful examination of the only evidence with regard to the knowledge of Barone and Zappan, the deposition transcript of Heriberto Sanchez, reveals nothing to support plaintiff's claim that Barone and Zappan knew that Oslick presented a physical threat to any parolee. At most, the transcript shows that Barone and Zappan knew that Oslick told off-color jokes and engaged in offensive banter with female parolees during transfers. (Deposition of Heriberto Sanchez, at 35, 40). I conclude that a reasonable jury could not infer from this evidence that Barone and Zappan knew or even suspected that Oslick would touch or assault female parolees.

[6] In order to prevail on a claim under 42 U.S.C. § 1985 (3), the plaintiff must show "(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons . . . [of] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States." Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). Givens has produced no evidence that Oslick conspired with Barone and Zappan, nor is there any evidence that any defendant was motivated by race. I conclude that a reasonable jury could not find on the record now before me that the elements of a § 1985 claim are met in this case.

[7] "[T]o survive summary judgment on an Eighth Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff is required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." Hamilton v. Leavy, 117 F.3d 742, 746 (3d Cir. 1997) (citing LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993), cert. denied, 510 U.S. 1164, 114 S. Ct. 1189 (1994)). Plaintiff has produced no evidence to satisfy any of these elements.

The failure of the federal claims[8] to withstand summary judgment leaves only state common law claims for intentional infliction of emotional distress, negligent supervision, assault, and battery. This Court will decline to exercise supplemental jurisdiction over these claims, pursuant to 28 U.S.C. § 1367 (c) (3), and will dismiss these claims without prejudice to their reassertion in state court.

This Court takes no pleasure in the pre-trial disposal of a case involving such serious allegations of egregious misconduct by a state official. Indeed, regardless of the particulars of what took place during the transfers, there is no doubt that the conduct of Oslick toward the women in his custody was reprehensible.[9] Nevertheless, the law requires plaintiff to produce sufficient evidence to create a genuine issue of material fact and thereby warrant a trial. As discussed above, plaintiff has not done so. Therefore, summary judgment must be granted in favor of defendants.

An appropriate Order follows.

---

[8] My conclusion that defendants are entitled to summary judgment on plaintiff's federal claims is bolstered by the decisions of other judges of this district who have addressed parolees' claims against Oslick. In each case, some involving more egregious allegations than the instant case, the courts have concluded that defendants were entitled to judgment as a matter of law on the federal claims. See, e.g., Harris, 1999 U.S. Dist. LEXIS 8404, at *17; Dill, 1999 U.S. Dist. LEXIS 10746, at *26.

[9] See Dill, 1999 U.S. Dist. LEXIS 10746, at *6 ("Upon learning that Mr. Oslick may have inappropriately touched one or more of the female parolees entrusted to his custody, [his supervisor] promptly initiated an inquiry on October 6, 1995. ... The investigation was concluded and Mr. Oslick was terminated within ten weeks.").

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **ICEALINDA GIVENS,** | : | **CIVIL ACTION** |
| | : | |
| **Plaintiff,** | : | |
| | : | |
| **v.** | : | |
| | : | |
| **CARL OSLICK, RONALD ZAPPAN, and MICHAEL BARONE,** | : | |
| | : | |
| | : | |
| **Defendants.** | : | **NO. 97-6756** |

**O R D E R**

**AND NOW**, this 21st day of June, 2000, upon a thorough consideration of the motion of defendant Carl Oslick (Document No. 21, reinstated by praecipe, Document No. 25) and the motion of defendants Ronald Zappan and Michael Barone (Document No. 20, reinstated by praecipe, Document No. 24), the response of Givens thereto, as well as the supplemental materials submitted by the parties pursuant to this Court's Order of June 17, 1999, and having concluded, for the reasons set forth in the foregoing memorandum, that plaintiff has failed to establish a genuine issue of material fact as to any of her federal claims, **IT IS HEREBY ORDERED** that

(1) the motions of defendants for summary judgment are **GRANTED** only as to Counts I, II, and III of plaintiff's second amended complaint; and

(2) Counts IV, V, VI, and VII are **DISMISSED WITHOUT PREJUDICE** to their reassertion in state court.

This is a final Order.

**LOWELL A. REED, JR., S.J.**